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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE JUAN FERRUSQUILLA, Defendant and Appellant.	B238503 (Los Angeles County Super. Ct. No. MA041766)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Remanded with instructions.

Elizabeth Courtenay, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Jose Juan Ferrusquilla appeals from the denial of a postjudgment motion for a recalculation of the amount of his conduct credits pursuant to the most recently amended version of Penal Code section 4019.[1] We conclude he has forfeited this issue on appeal. However, there is a discrepancy between the judgment and the sentencing statutes. Accordingly, we will remand the matter for resentencing.

STATEMENT OF THE CASE

Appellant pleaded no contest to one count of possession of a deadly weapon (§ 12020, subd. (a)(1)) and one count of making criminal threats (§ 422), both charged as felonies. He also admitted that he had suffered two prior convictions that qualified as "strikes" under the Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The court struck one strike in the interest of justice, as being too remote.

On August 18, 2008, the trial court denied probation and sentenced appellant to six years in state prison, calculated as follows: the "midterm" of "three years" for the criminal threats charge, doubled due to the strike, and the midterm of two years for the weapon charge, striking the strike as to this count and ordering that the sentence be served concurrently with the sentence imposed on count 2. The trial court gave appellant credit for 201 days of presentence custody credits, consisting of 135 actual days and 66 days of conduct credit. Appellant did not appeal from the judgment.

On December 14, 2011, appellant filed a "Motion to Correct Abstract of Judgment." In the motion, he argued that his conduct credits should be

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[1] All further statutory citations are to the Penal Code.

recalculated pursuant to an amended version of section 4019, effective on January 25, 2010. After the trial court denied the motion, appellant filed a timely appeal.

DISCUSSION

On appeal, appellant contends that under "settled equal protection principles," he is entitled to the recalculation of his custody credits pursuant to the most recent amended version of section 4019, effective October 1, 2011. Although appellant could have raised this issue below, he did not. Accordingly, it is forfeited on appeal and we decline to exercise our discretion to consider it. (See *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167 [failure to raise point in the trial court constitutes waiver].)[2]

We note, however, that the oral pronouncement of judgment, the minute order, and the abstract of judgment all state that appellant was sentenced to the "midterm" of "three years" on the criminal threats count. As the People acknowledge, three years is the *high* term for a violation of section 422. (See § 18 [unless provided otherwise, a felony is punishable by imprisonment for 16 months, two years, or three years].) Due to the discrepancy between the judgment and the sentencing statutes, we will remand the matter to the trial court for resentencing.

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[2] As to the issue actually raised in the trial court, the California Supreme Court has held that the failure to apply the 2010 version of section 4019 does not violate the equal protection clauses of the state and federal Constitutions. (*People v. Brown* (2012) 54 Cal.4th 314, 328.) Based upon the holding and reasoning in *People v. Brown*, several appellate courts have rejected appellant's contention on appeal. (See, e.g., *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1552; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 397-398 [failure to award additional custody credits under 2011 version of section 4019 does not violate equal protection clauses of state and federal Constitutions].) The California Supreme Court has granted review of a case that applied the most recent version of section 4019 to increase presentence custody credit for time in custody after October 1, 2011. (See *People v. Olague* (2012) 205 Cal.App.4th 1126, review granted Aug. 8, 2012, S203298.)

DISPOSITION

The matter is remanded for resentencing in light of this opinion.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.